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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. NICOLAS CESAREO, Defendant.	Criminal Case No. 08CR0201-W HEARING DATE: March 24, 2008 TIME: 2:00 p.m. UNITED STATES' RESPONSE TO DEFENDANT'S MOTIONS: (1) COMPEL DISCOVERY/PRESERVE EVIDENCE; AND (2) FOR LEAVE TO FILE FURTHER MOTIONS. TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Christopher M. Alexander, Assistant United States Attorney, and hereby files its Response and Opposition to Defendant's above-referenced motions. This Response and Opposition is based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On January 23, 2007, a federal grand jury in the Southern District of California returned an Indictment charging Defendant Nicolas Cesareo ("Defendant") with being a deported alien attempting to enter the United States after deportation in violation of 8 U.S.C. § 1326. Defendant was arraigned on the Indictment and entered a not guilty plea. The Court set a motion hearing date for February 11, 2008.

On January 29, 2008, Defendant filed a motion to compel discovery and for leave to file further motions. The United States now responds to Defendant's motions.

II

STATEMENT OF FACTS

A. THE APPREHENSION

On November 19, 2007, at approximately 2:11 a.m., Defendant made application for admission into the United States att he San Ysidro, California port of entry. Defendant was the driver and sole visible occupant of a black 1993 Honda Accord bearing California license plates 4BIP484. During primary inspection before Customs Border Protection Officer Sizemore, Defendant gave a negative declaration and presented a U.S. Passport bearing the name Oscar Edrey Velez. Upon a cursory inspection of the vehicle, CBP Officer Sizemore discovered people concealed in the trunk. Defendant and vehicle were escorted to secondary inspection for further investigation.

In secondary, the people were removed from the trunk of the vehicle. Further investigation revealed that all the people are undocumented aliens and citizens of Mexico.

Automated record checks on the vehicle showed that Defendant was not the registered owner of the vehicle. The checks further revealed that the license plates that did not belong on this particular vehicle. According to DMV records, the plates that should be on this vehicle are 3EOR724. A check on the VIN showed that the vehicle was reported stolen out of Chula Vista, California on November 8, 2007.

B. DEFENDANT'S STATEMENTS

On November 19, 2007, at approximately 4:57 a.m., CBP Enforcement Officers Fernando Cerda and Eric Velasquez conducted a video-recorded interview in English with Defendant. Defendant was advised of his Miranda rights in the presence of those officers, stated that he understood his rights, and executed a written waiver which indicated that he agreed to answer questions without a lawyer present. During the interview, Defendant was lucid and did not appear to be ill, intoxicated, or under the influence of drugs. He was alert, responsive, and appeared capable of communicating. He offered rational responses to questions. He did not appear to be unusually nervous or fearful. Defendant did not request or receive any bodily comforts during the interview and no promises or threats were made to elicit the statement. No breaks were taken during the interview and it ended at approximately 5:30 a.m.

Defendant stated that he has been living in Mexico for the past eight months since he was deported. Defendant confirmed that he was sentenced to three years prison for a drugs violation. Defendant stated that after he served one and a half years in prison he was deported from the United States. Defendant claimed that he is trying to obtain some kind of pardon but has not done so yet. Defendant stated that he has been living in a Motel in Mexico called Victoria and working at a strip bar called Club New York for the last six months. Defendant stated that his wife is living with his parents in Anaheim, California. Defendant stated that his son (Junior) is a three year old fell and got a concussion and is currently at UCI Medical center. Defendant stated that he wanted to return to the United States in violation of law to see his son.

Defendant stated that he met with a smuggler named Pedro and arranged his illegal entry into the United States. Defendant stated that he knows Pedro from the strip bar in which he works. Defendant stated that he purchased a U.S. Passport from Pedro for $400.00. Defendant stated that Pedro offered him a vehicle so he could drive through the border as well. Defendant stated that he agreed to borrow the vehicle and had to give $1,000 deposit.

Defendant stated that Pedro called him while he was at work. Defendant stated that he does not possess a cellular telephone but that Pedro called him to work. Defendant was unable to provide his work phone number or his motel phone number. Defendant stated that Pedro instructed him to pick up the vehicle at the airport parking lot in Tijuana. Defendant stated that, as instructed, he obtained a cab and went to the airport. Defendant stated that once there he was approached by a male in a blue truck. Defendant stated that the male in the blue truck gave him the keys for the Honda and also gave him a U.S. Passport with his picture but a different name on it. Defendant stated that he followed the truck out of the parking lot and that the man in the truck paid the $5.00 parking fee. Defendant stated that he did not know why he did not just cross through the Otay Mesa Port of Entry since he was already there. Defendant stated that he drove to San Ysidro and attempted to cross through that border. Defendant stated that he did not want to cross the border via pedestrian because he needed a vehicle to drive to Anaheim.

Defendant claimed that he never checked the vehicle for any humans or contraband. Defendant stated his only concern was to enter the United States and return to Anaheim. Defendant stated that if he would have been successful in entering the United States, he was going to go straight to Anaheim and then to a house in Los Angeles to drop off the vehicle. Defendant stated that he was instructed by Pedro to drop the vehicle off at 1101 W. 50th Street, Los Angles, California 90037. Defendant stated he was to ask for Rudy upon arrival to the drop off house. Defendant stated that Pedro gave him the number to the house as (323) 758-6469 and also gave him a second phone number of (213) 344-6147 with the name of Leonor for any assistance.

Defendant denied any knowledge of the undocumented aliens in the vehicle he was driving. Defendant stated that he did not care to look inside the vehicle since he was determined to cross the border. Defendant stated that Pedro told him the vehicle belonged to a cousin of his that was in Mexico.

Case was processed administratively. Vehicle was seized and turned over tot he California Highway Patrol ("CHP"). U.S. Passport was seized. Defendant was paroled into the custody of CHP for criminal disposition. All other undocumented aliens were processed for removal.

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C. DEFENDANT'S CRIMINAL AND IMMIGRATION HISTORY

Defendant's criminal history includes a conviction for robbery on July 11, 2006. He received a total of two years for this conviction.

Defendant was ordered deported on September 22, 2005 and was most recently removed on September 28, 2007.

III

MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE

The United States has and will continue to fully comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (19 U.S.C. § 3500), and Rule 16 of the Federal Rules of Criminal Procedure. The United States has already delivered 85 pages of discovery and DVD to defense counsel including investigative reports and Defendant's statements. Nevertheless, Defendant makes a series of discovery requests. The following is the United States' response to Defendant's various discovery requests.

1. Brady Material

Again, the United States is well aware of and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976) to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Defendant, however, is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused, or which pertains to the credibility of the United States' case. As stated in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that:

> [T]he prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality. [Citation omitted.]

Id. at 774-775.

The United States will turn over evidence within its possession which could be used to properly impeach a witness who has been called to testify.

Although the United States will provide conviction records, if any, which could be used to impeach a witness, the United States is under no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such information, disclosure need only extend to witnesses the United States intends to call in its case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

Finally, the United States will continue to comply with its obligations pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

2. Proposed 404(b) Evidence

Should the United States seek to introduce any similar act evidence pursuant to Federal Rules of Evidence 404(b) or 609, the United States will provide Defendant with notice of its proposed use of such evidence and information about such bad act at the time the United States' trial memorandum is filed. However, to avoid any arguments concerning lack of notice, the United States intends to introduce Defendant's prior immigration contacts as evidence of intent to enter the United States, alienage, prior deportation, and lack of application for admission. This includes any prior apprehensions. Moreover, Defendant's conviction for robbery will be introduced to impeach him should he testify.

3. Preservation of Evidence

The United States will preserve all evidence to which Defendant is entitled to pursuant to the relevant discovery rules. However, the United States objects to Defendant's blanket request to preserve all physical evidence.

The United States has, and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within his possession, custody or control of the United States, and which is material to the preparation of Defendant's defense or are intended for use by the United States as evidence in chief at trial, or were obtained from or belong to Defendant, including photographs. The United States has made the evidence available to Defendant and Defendant's investigators and will comply with any request for inspection.

4. Statements of Defendant

The United States has already produced reports disclosing the substance of Defendant's oral and written statements. The United States will continue to produce discovery related to Defendant's statements made in response to questions by agents. Relevant oral statements of Defendant are included in the reports already provided. Agent rough notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery.

A defendant is not entitled to rough notes because they are not "statements" within the meaning of the Jencks Act unless they comprise both a substantially verbatim narrative of a witness' assertions and they have been approved or adopted by the witness. United States v. Bobadilla-Lopez, 954 F.2d 519 (9th Cir. 1992); United States v. Spencer, 618 F.2d 605 (9th Cir. 1980); see also United States v. Alvarez, 86 F.3d 901, 906 (9th Cir. 1996); United States v. Griffin, 659 F.2d 932 (9th Cir. 1981).

5. Tangible Objects

Again, the United States is well aware of and will fully perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Defendant, however, is not entitled to all documents known or believed to exist, which is, or may be, favorable to the accused, or which pertains to the credibility of the United States' case.

The United States has, and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within the possession, custody or control of the United States, and which is material to the preparation of Defendant's defense or are intended for use by the United States as evidence in chief at trial, or were obtained from or belong to Defendant, including photographs.

The United States, however, need not produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985).

6. Expert Witnesses

Defendant requests written reports and summaries of any expert testimony pursuant to Federal Rules of Criminal Procedure 16(a)(1)(E). The United States will disclose to Defendant the name, qualifications, and a written summary of testimony of any expert the United States intends to use during its case-in-chief at trial pursuant to Fed. R. Evid. 702, 703, or 705.

At trial, the United States will offer the testimony of a Fingerprint Expert to establish Defendant's identity and prior history. The United States will provide a summary, and qualifications of the expert when they are available.

Although not expected to give expert opinions based upon specialized knowledge, the United States will also offer the testimony of a records custodian to introduce documents from Defendant's A-File. See Fed. R. Evid. 701 (such testimony is "helpful to a clear understanding of the determination of a fact in issue"); United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995) (in a drug case, the court found that "[t]hese observations are common enough and require such a limited amount of expertise, if any, that they can, indeed, be deemed lay witness opinion"); United States v. Loyola-Dominguez, 125 F.3d 1315, 1317 (9th Cir. 1997) (agent "served as the conduit through which the government introduced documents from INS' Alien Registry File".). This testimony will consist of explaining the purpose of the A-File, what documents are contained within the A-File, and the purpose of those documents.

7. Witness Addresses

The United States will provide Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the United States' trial memorandum is filed, although delivery of such a list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone numbers of possible witnesses of the United States. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977). Defendant has already received access to the names of potential witnesses in this case in the investigative reports previously provided to him.

8. Jencks Act Material

As stated previously, the United States will comply with its obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963), United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and the Jencks Act.

9. Informants and Cooperating Witnesses

Defendant incorrectly asserts that Roviaro v. United States, 353 U.S. 52 (1957), establishes a per se rule that the United States must disclose the identity and location of confidential informants used in a case. Rather, the United States Supreme Court held that disclosure of an informer's identity is required only where disclosure would be relevant to the defense or is essential to a fair determination of a cause. Id. at 60-61. Moreover, in United States v. Jones, 612 F.2d 453 (9th Cir. 1979), the Ninth Circuit held:

> The trial court correctly ruled that the defense had no right to pretrial discovery of information regarding informants and prospective government witnesses under the Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500, or Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Id. at 454. As such, the United States is not obligated to make such a disclosure, if there is in fact anything to disclosure, at this point in the case.

That being said, the United States is unaware of the existence of an informant in this case. However, as previously stated, the United States will provide Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the United States' trial memorandum is filed, although delivery of such a list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone numbers of possible witnesses of the United States. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977). Defendant has already received access to the names of potential witnesses in this case in the investigative reports previously provided.

10. Review A-File

Regarding Defendant's request to inspect the Alien Registration File ("A-File") associated with Defendant, the United States objects to this request. This information is equally available to Defendant through a Freedom of Information Act request. Even if Defendant could not ascertain the A-File through such a request, the A-File is not Rule 16 discoverable information. The A-File contains information that is not discoverable like internal government documents and witness statements. See Fed. R. Crim. P. 16(a)(2). Witness statements would not be subject to production until after the witness for the United States testifies and provided that a "motion" is made by Defendant. See Fed. R. Crim. P. 16(a)(2) and 26.2. Thus, the A-File associated with Defendant need not be disclosed.

Defendant may claim that the A-File must be disclosed because (1) it may be used in the United States' case-in-chief; (2) it is material to his defense; and (3) it was obtained from or belongs to him.

See Fed. R. Crim. P. 16(a)(1)(E). The United States will produce documents it intends to use in its case-in-chief. Evidence is material under Brady only if there is a reasonable probability that had it been disclosed to the defense, the result of the proceeding would have been different. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). However, Defendant has not shown how documents in the A-File are material. Finally, Defendant does not own the A-File. It is an agency record. Cf. United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997) (noting that A-File documents are admissible as public records). Should the Court order inspection of relevant documents from the A-File, the United States will facilitate the inspection as it does in other cases.

11. Residual Requests

The United States objects to this request. The United States has and will continue to comply with its discovery obligations.

V

DEFENDANT'S MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Defendant's motion for leave to file further motions should be denied except to the extent that such motions are based on new discovery.

VI

CONCLUSION

For the foregoing reasons, the United States asks that the Court deny Defendant's motions, except where unopposed, limit further motions to those based on new law or facts.

DATED: March 20, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Christopher M. Alexander

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NICOLAS CESAREO, Defendant.	Criminal Case No. 08CR0201-W **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, CHRISTOPHER ALEXANDER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response to Defendant's Motions to (1) compel discovery/preserve evidence, and (2) for leave to file further motions, together with statement of facts, memorandum of points and authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Zandra Lopez, Esq.
   Atty for Defendant

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 2008.

s/Christopher M. Alexander

CHRISTOPHER M. ALEXANDER